(8)

No. 00-24

Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

IN THE

Supreme Court of the United States

NOV 13 2000

PGA TOUR INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

ANN ELIZABETH REESMAN *
MCGUINESS NORRIS & WILLIAMS, LLP
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

November 2000

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE ADA'S "PUBLIC ACCOMMODATIONS" PROVISION ADDRESSES ACCESS ONLY TO THE AREAS IN WHICH GOODS AND SERVICES ARE OFFERED BY A PLACE OF PUBLIC ACCOMMODATION, AND NOT TO NON-PUBLIC AREAS OF THE FACILITY	5
A. Title III Establishes Separate and Different Requirements for Access to Goods and Services Offered by a Place of Public Accommodation and Access to a Commercial Facility	5
B. The "Public Accommodations" Provision Focuses Solely on Access to the Goods and Services that the Business Offers to the Public	6
1. The statutory language relates only to the goods and services being offered to the public	6
2. Other language in Section 302, together with the legislative history, supports this construction	9
C. Section 303, Not 302, Addresses Access to an Entire Commercial Facility	10

TABLE OF CONTENTS—Continued

	Page
D. Misreading the ADA's "Public Accommodations" Requirements To Encompass Private Areas Erroneously Expands the Scope of the Statute	12
II. TITLE III OF THE ADA DOES NOT REQUIRE A PLACE OF PUBLIC ACCOMMODATION TO MAKE A FUNDAMENTAL ALTERATION TO THE GOODS AND SERVICES IT OFFERS BY CHANGING THEIR CONTENT	15
A. The Statutory Language Provides Explicitly That a Fundamental Alteration Is Not Required	15
B. Title III Does Not Require Changes to the Content of Goods and Services Offered by a Place of Public Accommodation	16
C. Changing the Rules of a Professional Golf Tournament Would Be a Fundamental Alteration That Exceeds the ADA's Requirements	20
CONCLUSION	21

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Alexander v. Choate, 469 U.S. 287 (1985)	19
Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n., 37 F.3d 12 (1st Cir. 1994)	6, 17
Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 845 (2000)	18
EEOC v. Staten Island Savings Bank, 207 F.3d 144 (2d Cir. 2000)	18
Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999)	6, 17, 18
Kimber v. Thiokol Corp., 196 F.3d 1092 (10th Cir. 1999)	18
Lewis v. Kmart Corp., 180 F.3d 144 (4th Cir. 1999)	18
McNeil v. Time Ins. Co., 205 F.3d 179 (5th Cir. 2000)	17, 18, 20
Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113 (3d Cir. 1998)	15
Olinger v. United States Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000)	4, 20
Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 2000)	18
Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998)	18
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	15
Stevens v. Premier Cruises, Inc., 215 F.3d 1237 (11th Cir. 2000)	8, 9
Stoutenborough v. National Football League, 59 F.3d 580 (6th Cir. 1995)	6

TABLE OF AUTHORITIES—Continued

	Page
Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000)	17

STATUTES

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213	3
Americans with Disabilities Act, Title I 42 U.S.C. §§ 12111-12117	2
Americans with Disabilities Act, Title III 42 U.S.C. §§ 12181-12189	2, 4, 5
42 U.S.C. § 12181(2)	5
42 U.S.C. § 12181(7)	6
42 U.S.C. § 12181(7)(B)	7
42 U.S.C. § 12181(7)(E)	7
42 U.S.C. § 12181(7)(L)	6
42 U.S.C. § 12182	7
42 U.S.C. § 12182(a)	5
42 U.S.C. § 12182(b)(1)(A)(iv)	9
42 U.S.C. § 12182(b)(1)(D)	7
42 U.S.C. § 12182(b)(2)(A)(ii)	7, 15, 19
42 U.S.C. § 12182(b)(2)(A)(iii)	7, 8, 15, 19
42 U.S.C. § 12182(b)(2)(A)(iv)	7
42 U.S.C. § 12183	5
42 U.S.C. § 12183(a)(1)	10
Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq*	15
29 U.S.C. § 794	19

REGULATIONS

28 C.F.R. § 36.303	8
28 C.F.R. § 36.305	8
28 C.F.R. § 36.307(a)	16
28 C.F.R. § 36.406	10
28 C.F.R. pt. 36, Appendix A	10

TABLE OF AUTHORITIES—Continued

	Page
28 C.F.R. pt. 36, App. A, § 4.1.1(3)	12
28 C.F.R. pt. 36, App. A, § 4.13.5	10
28 C.F.R. pt. 36, App. A, § 4.26	10
28 C.F.R. pt. 36, App. B, § 36.104	13
28 C.F.R. pt. 36, App. B, § 36.307	16

LEGISLATIVE HISTORY

H.R. Rep. No. 101-485, pt. 2 (1990)	9, 11, 12, 16
H.R. Rep. No. 101-485, pt. 3 (1990)	11, 12
S. Rep. No. 101-116 (1989)	*passim*

OTHER AUTHORITIES

Dep't. of Justice, *Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities*, § III-3.11000 (Nov. 1993)	18

IN THE

Supreme Court of the United States

No. 00-24

PGA TOUR INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] Letters of consent from both parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of Petitioner PGA Tour, Inc., before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

discriminatory employment practices. Its membership now includes more than 340 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117. In addition, all of EEAC's members are subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189, some because they own, lease (or lease to) or operate places of public accommodation, and all because they own and operate commercial facilities.

Therefore, EEAC's members have a substantial interest in the Court's decision in this case. The court below ruled incorrectly that Title III obligated the sponsor of a professional golf tournament to waive a rule of tournament competition for a player whose disability made him unable to play by that rule. Although it may appear narrow, the decision below could have significant ramifications for every business that offers goods or services to the public, for two reasons. First, by extending Title III's reach past the ropes of the golf tournament into the area of the course reserved for players and their support staffs, the decision arguably pushes Title III into the back rooms, kitchens and other non-public areas of every other place of public accommodation. Second, by requiring the PGA Tour to change the rules of its competition, the decision could be read as requiring places of public accommodation to change the nature of the goods and

services they offer, something well beyond the scope of Title III. In both of these ways, the Ninth Circuit inadvertently may have extended rights under Title III to those who are permitted into restricted, non-public areas of public accommodations as providers, rather than recipients, of the goods and services.

EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

PGA Tour, Inc. ("PGA"), a non-profit association of professional golfers, sponsors three professional golf tours, of which the "PGA Tour" is the most competitive. Pet. App. 2a. Professional golfers qualify for the PGA Tour by playing in a three-stage competition called the "qualifying school." Pet. App. 2a-3a. In the third stage of the qualifying school, and in the PGA Tour competition itself, the rules require players to walk the course during play, although they may use golf carts in the first two stages. Pet. App. 3a. The purpose of the "walking rule," as it is called, is to add a factor of stress and fatigue to the competition. Pet. 4.

Respondent Casey Martin has a physical disability that makes it extremely difficult for him to walk. Pet. App. 2a. Upon completing the first two stages of qualifying school for the PGA Tour in 1997, Martin sought a waiver of the "walking rule" for the third stage. Pet. App. 3a. When the PGA Tour refused, Martin sued under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. While summarily rejecting Martin's claim of employment discrimination under Title I, Pet. App. 25a, the district court granted a preliminary injunction, and then a permanent

injunction in favor of Martin and against PGA under Title III. Pet. App. 3a. The district court concluded that Title III obligated PGA to waive the "walking rule" for Martin. The Ninth Circuit affirmed. Pet. App. 1a. The next day, the U.S. Court of Appeals for the Seventh Circuit reached precisely the opposite conclusion on nearly identical facts. *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000). This Court granted PGA's petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, deliberately addresses access to private businesses in two separate ways. One set of requirements, found in § 302 of the ADA, requires places of public accommodation to provide customers and clients with disabilities an equal opportunity to enjoy whatever goods and services the business offers to the public. Only § 303, which requires that new construction or substantial modifications to commercial facilities be built according to established accessibility requirements, addresses the private areas of these facilities not open to the public. Reading the two provisions as overlapping, so as to apply the § 302 requirements to non-public areas of a place of public accommodation, such as a hotel kitchen or the area inside the ropes of a professional golf tournament, inappropriately expands the scope of the statute substantially.

Moreover, Title III of the ADA does not require a place of public accommodation to make a fundamental alteration to the goods or services it offers to the public, such as changing the content of those goods and services in any way. A change to the rules of a professional golf tournament is such a fundamental alteration.

ARGUMENT

I. THE ADA'S "PUBLIC ACCOMMODATIONS" PROVISION ADDRESSES ACCESS ONLY TO THE AREAS IN WHICH GOODS AND SERVICES ARE OFFERED BY A PLACE OF PUBLIC ACCOMMODATION, AND NOT TO NON-PUBLIC AREAS OF THE FACILITY

A. Title III Establishes Separate and Different Requirements for Access to Goods and Services Offered by a Place of Public Accommodation and Access to a Commercial Facility

Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, takes a two-stage approach towards legislating access by individuals with disabilities to privately owned businesses. One set of requirements, § 302 of the law, prohibits certain acts — or failures to act — that the law construes as discrimination against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The other set of requirements, § 303, applies not only to "public accommodations" but also to a broader category of "commercial facilities," defined generally as those "intended for nonresidential use." 42 U.S.C. § 12181(2). This second set of requirements is strictly forward-looking, mandating that accessibility be part of the design and construction when a new commercial facility is built or when an existing commercial facility undergoes significant alterations. 42 U.S.C. § 12183.

Because they impose two very different sets of obligations on two very different universes, the distinction between § 302 and § 303 is an important one. Section 302's

nondiscrimination provisions apply only to the comparatively narrow realm of access to the goods, services, and the like offered by a "place of public accommodation," [2] and only § 303's design and construction requirements apply to the broader category of "commercial facilities."

B. The "Public Accommodations" Provision Focuses Solely on Access to the Goods and Services that the Business Offers to the Public

1. *The statutory language relates only to the goods and services being offered to the public*

Title III defines "public accommodation" by enumerating a finite list of twelve categories of businesses that offer goods and services to the public. 42 U.S.C. § 12181(7). Each of the twelve categories is described by itemizing a few examples,

---

[2] In our view, there is a serious issue as to whether either PGA or the PGA Tour is even a "place of public accommodation" and thus a proper defendant under Title III. While the definition of "public accommodation" includes a "golf course, or other place of exercise or recreation," 42 U.S.C. § 12181(7)(L), neither PGA nor the PGA Tour is a "golf course," or any other kind of "place." Nor does the PGA or the PGA Tour own, lease or operate a golf course *as a public golf course*. Several circuit courts of appeals have ruled that the phrase "place of public accommodation" denotes an actual physical location, and therefore have concluded that the type of discrimination prohibited by Title III involves access to a good or service connected to or provided by an actual place, absent which Title III does not apply. *E.g., Stoutenborough v. National Football League*, 59 F.3d 580, 583 (6th Cir. 1995) (holding that a television broadcast is not a service of the facility, or arena, where a football game is played); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (holding no Title III coverage in challenge to insurance benefits where no connection to a place of public accommodation), *cert. denied*, 525 U.S. 1093 (1999). *But see Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994) (suggesting in *dicta* that Title III should require more than just physical access to a place of public accommodation, but declining to speculate on the full extent of what such coverage might entail).

followed by a more general statement that illustrates the scope of the category, *e.g.*, "a restaurant, bar, or other establishment serving food or drink," 42 U.S.C. § 12181(7)(B), and "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment, 42 U.S.C. § 12181(7)(E).

Section 302's general nondiscrimination provision is followed by rules of construction consisting of "general" and "specific" prohibitions. 42 U.S.C. § 12182. In general, § 302 states that it is unlawful discrimination to deny an individual with a disability the opportunity to participate in or benefit from whatever the entity provides, or to provide only a separate or unequal benefit. It further generally prohibits using "standards or criteria or methods of administration" that discriminate. 42 U.S.C. § 12182(b)(1)(D). More specifically, § 302 prohibits using eligibility criteria that screen out people with disabilities, and also requires the public accommodation "to make reasonable modifications [that] are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations" being offered, 42 U.S.C. § 12182(b)(2)(A)(ii), and "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently . . ." as long as doing so would not "fundamentally alter the nature of" the goods, etc. being offered. 42 U.S.C. § 12182(b)(2)(A)(iii). Finally, § 302 provides in relevant part that public accommodations must remove architectural barriers and structural communications barriers where doing so is "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv).

One common thread among all of § 302's rules of construction is that they purposefully define a covered entity's obligations in terms of the "goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation . . . ." In other words, the thrust of § 302 is to ensure that whatever a place of public

accommodations offers to the public, it is accessible to a member of the public with a disability, if access can be provided without imposing too much of a burden on the business.

In some cases providing access will mean, at a minimum, physical access to a facility. For example, access to the services provided by a movie theater necessarily means, at the very least, physical access to the theater. Notably, a public accommodation need not always provide physical access to its facility in order to meet § 302's requirements. For example, where removing architectural barriers, *e.g.*, steps, is not readily achievable, a store or restaurant may provide curb service or home delivery as an alternative, if *that* is readily achievable. 28 C.F.R. § 36.305.

In other situations, providing access to the goods or services offered by the public accommodation will mean providing "auxiliary aids and services" where doing so would not fundamentally alter the nature of the goods or services offered and would not impose an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii). This may require providing a sign language interpreter for a lecture series, or Braille menus—or someone to read the menu aloud—in a fast food restaurant. *Cf.* 28 C.F.R. § 36.303.

In any of these circumstances, however, the focus remains on the good or service that the place of public accommodation is offering. Section 302 does not mandate general accessibility to all of the premises that house a public accommodation, such as the "employees only" or "service" areas of a business that caters to the public. Thus, for example, Section 302 does not extend its requirements to a hotel or restaurant kitchen, or the area behind the counter in a dry cleaning establishment. While Section 302 requires a retail store to provide customers with disabilities with access to the goods it sells, it does not address the stockroom or the loading dock. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d

1237, 1241 n.5 (11th Cir. 2000) (while holding that portions of cruise ships are public accommodations subject to Title III of the ADA, court noted that other portions, "such as the bridge, the crew's quarters, and the engine room, might not constitute public accommodations" and, if not, "are not subject to Title III's public accommodations provisions").

2. *Other language in Section 302, together with the legislative history, supports this construction*

The additional language and legislative history of Section 302 confirm its focus on the goods and services offered to the public. Section 302(b)(1)(A)(iv), part of the "general" construction rule, provides that for purposes of all of the "general" construction rules as to activities, "the term 'individual or class of individuals' refers to the *clients or customers* of the covered public accommodation that enters into the contractual, licensing or other arrangement." 42 U.S.C. § 12182(b)(1)(A)(iv) (emphasis added). According to the legislative history of this provision, it was added to clarify Section 302's coverage of public accommodations that enter into contractual arrangements. In particular, the legislative history confirms that this subsection extends Section 302 to cover the public accommodation's own "clients or customers," and not those of the entity with which it contracts. H.R. Rep. No. 101-485, pt. 2, at 101 (1990) (hereinafter "House Labor Report"). "Thus, a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers." *Id.* The Senate Labor Committee's report addresses this point even more directly, pointing out that "[a]pproximately forty-three million persons with disabilities will be entitled to the protection of this legislation as employees, job applicants, *clients and customers of places of public accommodation*, and

users of telephone services." S. Rep. No. 101-116, at 88 (1989) (hereinafter "Senate Labor Report"). The clear implication of all of these statements is that Title III covers the "clients and customers" of places of public accommodations, who are entitled to access to whatever goods or services are being offered to the public, and not to those individuals who may interact with the public accommodations in other ways.

C. Section 303, Not 302, Addresses Access to an Entire Commercial Facility

Broader access to the entire facility of a place of public accommodation is addressed, not in § 302, but in § 303, which relates to commercial facilities *including* public accommodations. Section 303 requires nothing at all until a new facility is built, or substantial modifications are made to an existing building, at which time the new construction or alteration must be built so that it is "readily accessible to and usable by individuals with disabilities . . . ," 42 U.S.C. § 12183(a)(1). Pursuant to Congressional mandate under § 306(b) and (c) of the ADA, the U.S. Department of Justice has published standards for new construction and alterations at 28 C.F.R. § 36.406, incorporating the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") developed and published by the Architectural and Transportation Barriers Compliance Board at 28 C.F.R. pt. 36, Appendix A.

The ADAAG essentially is a "building code" that applies to all commercial facilities, not just those that house places of public accommodation. It sets specific accessibility requirements such as the width of doorways, 28 C.F.R. pt. 36, App. A, § 4.13.5, and the size, strength and placement of handrails, 28 C.F.R. pt. 36, App. A, § 4.26. Again, the legislative history of § 303 confirms that it is *this* section that was intended to apply to virtually the entire facility. As the Senate Labor Report explains, the term "readily accessible to or usable by"

> is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter, and use a facility. While the term does not necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility. . .
>
> For example, for a hotel "readily accessible to and usable by includes, but is not limited to, providing full access to the public use and common use portions of the hotel . . . .
>
> In a physician's office, "readily accessible to and usable by" would include ready access to the waiting areas, a bathroom, and a percentage of the examining rooms.

Senate Labor Report at 69-70. *See also* House Labor Report at 118. As the House Labor Committee explained, "both areas that will be used by patrons and areas that will be used by employees, are covered under these standards." House Labor Report at 116. The House Judiciary Committee agreed. H.R. Rep. No. 101-485, pt. 3, at 62-63 (1990) (hereinafter "House Judiciary Report").

The purpose underlying Congress' two-stage approach to accessibility was one of allocation of resources. Rather than requiring instant accessibility everywhere, Congress sought to spread out expenditures so that accessibility eventually would be attained through the passage of time. As the House Judiciary Committee said:

> The ADA is geared to the future—the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible. The provision governing alterations is akin to new construction because it is only applicable to situations where the commercial facility itself has chosen to alter the premises.

House Judiciary Report at 63.

Even with respect to commercial facilities, § 303's coverage of non-public, "employees only" areas is limited. To the extent that accessibility is needed for particular workstations, those are left entirely to Title I of the ADA, which governs employment:

> As noted above, the standard of "readily accessible to and usable by" applies not only to areas that will be used by patrons, but also to areas that may be used by disabled employees. . . The same basic approach applies in employment areas for both public accommodations and commercial facilities. Thus, access into and out of the rooms is required. In addition, there must be an accessible path of travel in and around the employment area. The basic objective is that a person with a disability must be able to get to the employment area. . . .
>
> The standard does not require, however, that individual workstations be constructed accessible or be outfitted with fixtures that make it accessible to a person with a disability. Such modifications will come into play in the form of reasonable accommodations when a person with a disability applies for a specific job and is governed by the undue hardship standard. . . .

House Labor Report at 119. *See also* House Judiciary Report at 62-63. Accordingly, the ADAAG contains a corresponding exemption for "work areas." 28 C.F.R. pt. 36, App. A, § 4.1.1(3).

D. Misreading the ADA's "Public Accommodations" Requirements To Encompass Private Areas Erroneously Expands the Scope of the Statute

Extending the requirements of § 302 beyond the public access areas of a place of public accommodation blurs the otherwise clear distinction between the requirements of § 302 and those of § 303, and substantially expands the scope of the

statute. The Department of Justice itself, which has enforcement authority over Title III, has recognized the possibility that a commercial facility may be part public accommodation, part not:

> If a tour of a commercial facility that is not otherwise a place of public accommodation, such as, for example, a factory or a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and the tour must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. Hence, the barrier removal requirements of § 36.304 only apply to the physical route followed by the tour participants and not to work stations or other areas that are merely adjacent to, or within view of, the tour route. If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

28 C.F.R. pt. 36, App. B, § 36.104. In the same discussion, the agency also describes, under the general term "mixed-use," such varied operations as a wholesale grocer (a commercial facility) that runs a roadside stand selling produce to the public (a public accommodation); a hotel that has a residential wing (not subject to Title III); and a public wing (a place of lodging covered by Title III as a place of public accommodation). In each of these situations, the government explains that the "public accommodations" provisions of the ADA apply only to that segment of the facility that is indeed a public accommodation.

Moreover, a misreading of § 302 that extends its requirements to the entire operation of a business that

services the public, rather than merely the "accommodations" it offers the public and the physical space used for that purpose, creates significant anomalies that cannot be reconciled. For example, this overly-broad reading of § 302 would extend its obligations into the kitchen area of a typical hotel. There, an independent contractor who runs his own dishwasher repair service, and who uses a wheelchair, arguably could claim that the hotel discriminated against him by not providing access inside the dishwasher area, even though § 303 would not require such access even in a new building. At a retail store, a business invitee who delivers shipments of goods for sale to the loading dock, and who has a hearing impairment, could argue that the store discriminated by not providing a sign language interpreter for him to communicate with store employees receiving the shipment.

Such a reading of § 302 would substantially broaden the statute's reach. Title I of the ADA details the actions an employer is required to take to accommodate the needs of its employees and applicants with disabilities. The public accommodations provisions of Title III address access by clients and customers to whatever goods and services a public accommodation offers to the public, while the commercial facilities provisions establish prospective requirements for accessibility to the entire facility whenever a new building is built or a significant modification is made. Extending the "public accommodations" requirements to areas of the physical plant that the public is not permitted to enter arguably would extend those requirements to non-employee, non-customer, non-client relationships. Doing so would remarkably expand the obligations of every place of public accommodation in America, to ensure not only that the public has access to the goods and services it provides, but also that everyone else whom it permits to enter those parts of its premises that are off-limits to the public, has the same rights as its clients and customers to whom it offers its goods and

services. If this degree of breadth were contemplated by Congress, surely it would be reflected in the Act.[3]

II. TITLE III OF THE ADA DOES NOT REQUIRE A PLACE OF PUBLIC ACCOMMODATION TO MAKE A FUNDAMENTAL ALTERATION TO THE GOODS AND SERVICES IT OFFERS BY CHANGING THEIR CONTENT

A. The Statutory Language Provides Explicitly That a Fundamental Alteration Is Not Required

While Title III requires a public accommodation to make "reasonable modifications" and "take such steps as may be necessary," to allow an individual with a disability equal treatment, it does not require a public accommodation to "fundamentally alter" the product it offers the public. 42 U.S.C. § 12182(b)(2)(A)(ii) and (iii). Rather, Section 302 provides specifically to the contrary. *Id.* The phrase is drawn from this Court's opinion in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), holding that the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, did not require an educational institution to make a "fundamental alteration in the nature of [its nursing school] program" in order to allow an individual with a severe hearing disability to participate. *Id.* at 410.

---

[3] For this reason, the Third Circuit's decision in *Menkowitz v. Pottstown Mem'l Med Ctr.*, 154 F.3d 113 (3d Cir. 1998), is in error. The Third Circuit ruled that a hospital that suspended a physician's staff privileges could be sued under Title III, as having denied him the "'full and equal enjoyment of the good, services, facilities, privileges, advantages, or accommodations'" it provided. *Id.* at 122. In its zeal to find a cause of action, the Third Circuit overlooked the obvious: that the "service" a hospital provides is medical care to the public, and that the staff privileges of a particular non-employee doctor are merely antecedent to that service.

B. Title III Does Not Require Changes to the Content of Goods and Services Offered by a Place of Public Accommodation

Section 302 requires a public accommodation to give individuals with disabilities the same access to whatever goods or services it offers; it does not require the business to offer *different* goods or services that better meet the needs of people with disabilities. Accordingly, *any* change to the content of the goods or services offered to the public would constitute a fundamental alteration not required by Title III.

As the Department of Justice explained in the preamble to the regulations implementing Title III, "[t]his part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). As the agency said:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.

28 C.F.R. pt. 36, App. B, § 36.307. The same principle is reflected in the legislative history. *See* Senate Labor Report at 63-64, House Labor Report at 107. The Senate Labor Committee further illustrated the point that Title III does not require a place of public accommodation to alter the "services" it offers:

> [A] physician who specializes in treating burn victims could not refuse to treat the burns of a deaf person because of his or her deafness. However, such a physician need not treat the deaf individual if he or she does not have burns nor need the physician provide other types of medical treatment to individuals with disabilities unless he or she provides other types of medical treatment to nondisabled individuals.

Senate Labor Report at 62-63.

Several of the courts of appeals have had occasion to address directly the issue of whether Title III extends to the *content* of goods and services provided, in the context of insurance policies. Each of these, including the Ninth Circuit, have concluded that it does not.[4] As the Third Circuit correctly reasoned, "Just as a bookstore must be accessible to the disabled but need not treat the disabled equally in terms of books the store stocks, likewise an insurance office must be physically accessible to the disabled but need not provide insurance that treats the disabled equally with the non-disabled. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999). *See also Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) ("The ordinary meaning of [Title III's] language is that whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services. This language does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided"); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 186 (5th Cir. 2000) (holding that under the plain language of the statute, Title III forbids denying the disabled full and equal

---

[4] The First Circuit's decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), often cited for the opposite position, does not actually reach the issue, describing the question as "ambiguous," 37 F.3d at 19, and declining to address it, 37 F.3d at 20.

enjoyment of whatever goods and services are offered, but does not regulate the content of those goods and services); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) ("section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled, even if the product is insurance"), *cert. denied*, 120 S. Ct. 845 (2000); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997) (en banc) ("Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation") (footnote omitted), *cert. denied*, 522 U.S. 1084 (1998).[5] *Cf. EEOC v. Staten Island Sav. Bank*, 207 F.3d 144 (2d Cir. 2000) (reaching same conclusion under Title I with respect to employer-provided insurance);[6] *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999) (same); *Lewis v. Kmart Corp.*, 180 F.3d 166, 168 (4th Cir. 1999) (holding that under Title I, providing employee with access to the benefit offered by the employer is sufficient (relying on *Rogers v. DHEC*, 174 F.3d 431 (4th Cir. 1999) (deciding same issue under Title II)), *cert. denied*, 120 S. Ct. 978 (2000)).

---

[5] As several of these courts have pointed out, the Department of Justice inexplicably has taken a contrarian position, solely with respect to insurance products. Dep't of Justice, *Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities*, § III-3.11000, at 19 (Nov. 1993). These courts correctly have rejected the Justice Department's statement, observing that it is "'manifestly contrary' to the plain meaning of Title III and, accordingly, is not binding on this court." *Ford*, 145 F.3d at 613 (citation omitted); *Parker*, 121 F.3d at 1012 n.5. *See also Doe*, 179 F.3d at 563 (describing the guidance as lacking "a focused attention to coverage limits").

[6] The Second Circuit's decision in *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999), is not to the contrary. *Pallozzi* concluded that Title III requires not only physical access, but also prohibits a public accommodation from refusing to do business with an individual with a disability because of the disability. 198 F.3d at 33.

This resolution is consonant with the clear statutory language providing that a place of public accommodation need not "fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations . . . ." 42 U.S.C. § 12182(b)(2)(A)(ii). *See also* 42 U.S.C. § 12182(b)(2)(A)(iii). While a place of public accommodation may be able to make "reasonable modifications in policies, practices and procedures . . . to afford such goods, services [etc.] to individuals with disabilities," 42 U.S.C. § 12182(b)(2)(A)(ii), or "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," 42 U.S.C. § 12182(b)(2)(A)(iii), both provisions halt the obligation short of fundamentally altering whatever it is that the public accommodation offers.

This language also is consistent with this Court's decisions interpreting the Rehabilitation Act of 1973, the predecessor to the ADA. In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court ruled that the State of Tennessee's decision to reduce from 20 to 14 the number of inpatient days for which Medicaid would reimburse hospitals on behalf of a single recipient in a fiscal year did not violate Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Although the reduction arguably would have affected individuals with handicaps more severely than those without handicaps, the Court reasoned that the Rehabilitation Act "does not . . . guarantee the handicapped equal results from the provision of state Medicaid . . . ." *Id.* at 304. Rather, the Court concluded, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." *Id.* at 301.

As the Fifth Circuit has explained, "it is literally possible, though strained, to construe 'full and equal enjoyment' to

suggest that the disabled must be able to enjoy every good and service offered to the same and identical extent as those who are not disabled. Construed in this manner, the statute would regulate the content and type of goods and services. That would be necessary to ensure that the disabled's enjoyment of goods and services offered by the place of public accommodation would be no less than, or different from that of the non-disabled. But such a reading is plainly unrealistic, and surely unintended, because it makes an unattainable demand." *McNeil*, 205 F.3d at 187.

C. Changing the Rules of a Professional Golf Tournament Would Be a Fundamental Alteration That Exceeds the ADA's Requirements

In the instant case, Martin makes such an unattainable demand. Even assuming that Title III applies to the competitors on the PGA Tour rather than just the spectators, the modification Martin is requesting is a fundamental change to what the PGA Tour offers — a professional, competitive athletic event. The Seventh Circuit correctly resolved this question in a case involving nearly identical facts, holding that waiver of the "walking rule" to allow a competitor with a disability to ride in a golf cart would "fundamentally alter the nature of the competition." *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1005 (7th Cir. 2000). While it is regrettable that Martin cannot meet the "walking rule," his situation is no different from that of an individual with a visual disability who cannot fully and equally enjoy the goods offered in an ordinary bookstore. While the store certainly could not deny that person access, or refuse to sell him books because of his visual disability, it would not be required to stock Braille books to accommodate him, since doing so would be a fundamental alteration to the goods it offers the public. In the same way, if Martin could qualify for the PGA Tour, the PGA could not deny him access to the Tour, nor could it refuse to let him play the same game as other

competitors. The PGA is not, however, required to fundamentally alter the nature of the competition.

CONCLUSION

For the reasons set forth above, *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

ANN ELIZABETH REESMAN *
MCGUINESS NORRIS & WILLIAMS, LLP
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

November 2000

**Counsel of Record*